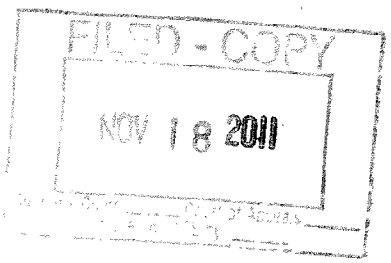
11-18-2011

Kugler v. Heikes Appellant's Reply Brief Dckt. 38352

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN B. KUGLER,	)	
	)	
PLAINTIFF-APPELLANT,	)	
	)	**DOCKET NO. 38352-2010**
V.	)	
	)	
KENNETH W. HEIKES, JAMES M. PAHL, ESTATE OF E. L. DERR and SUSAN DERR,	)	
	)	
DEFENDANTS-RESPONDENTS.	)	
	)	



APPELLANT'S REPLY BRIEF

An appeal from the District Court of the Sixth Judicial Court of The State of Idaho, in and for the County of Bannock,

Honorable David C. Nye, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent's counsel, in his statement of facts, failed to set forth that his filing of the Hunter affidavit on March 10, 2009 was not preceded by an order granting leave to file another affidavit. It is a fact that in March of each year accountants are booked solid on income tax returns and are not easily engaged. In his time line he erroneously set forth that Judgment was entered in favor of his clients on November 5, 2009 as the appellate record (ROA Report, p. 5) clearly reflects that the judgment entered on that date was in favor of appellant and against the defendants. It is also asserted by counsel that it is a fact that respondents each lost $ 15,176 on their investment. That is not a true fact. The unrefuted fact is that each of the respondents obtained income tax offsets of 30 percent to 40 percent and in effect obtained a substantial net return over their investment. (Heikes Dep., Rec. Vol II, p. 288, 289) (Kugler, Aff. Rec. Vol. II, p. 258) The fact is that the only persons who incurred a loss were your appellant and Mr. Sorenson, the fifth member of Pine Cone who also owned a 20 % interest. No title or transfer of 40 % of the LLC was ever conveyed to the respondent's who, by the misrepresentation in correspondence from Mr. Heikes, obtained

the signatures of Mr. Sorenson and your appellant in order to obtain 100% of the assets when liquidated.

ARGUMENT

This Court is now reviewing the record in this proceeding in the same manner as if each were sitting as a magistrate in the first instance. Counsel for the respondents, even in this proceeding, has the burden of proof on the issue of whether or not summary judgment in favor of the respondents is supported by the record. In his argument he fails to come up with any idea or suggestion as to how the respondents acquired appellant's 20% interest in the LLC. The trial magistrate did not have a finding or conclusion on that question either. Counsel did not present anything of record to support the magistrate's finding that appellant was aware of everything that was going on by the respondent's in regard to Pine Cone other than to assert that Mr. Heikes sent a financial statement at the end of each year. A review of those records, post occurances, is not informative of much of anything and as Mr. Heikes acknowledged in his first affidavit that he was proceeding on the basis that Mr. Sorenson and your appellant had disassociated ourselves from Pine Cone.

The magistrate made a finding that appellant did not present evidence to support a claim for fraud. The magistrate made no conclusion or specific finding in regards to appellants claim for breach of contract or appellant's claim for a constructive trust. The District Court, on appeal, asserted that the magistrate made

a reasoned decision. If the magistrate's decision was "reasoned" then the magistrate was performing improperly in the granting of summary judgment as the record is full of disputed facts. What is not in dispute is that the respondent's, at no time, made any effort to comply with the provisions of the Pine Cone operational agreement that they all not only read but had also, particularly the defendant Heikes and the defendant Pahl, made suggestions in its formulation. For some unknown reason the magistrate failed to give any significance to the failure of the respondents in that regard. Noncompliance with an operating agreement should have some effect if it adversely affects other individuals. Counsel for the respondent's handles that issue by asserting that "additional monies had to be put in." Mr. Heikes acknowledged that at one time earlier he had had an offer for the property of $145,000.00 which, if he had presented it to the members, could have resulted in a sale with everyone having an equal loss, not the disparaging unequal loss he effected when he caused a distribution of all proceeds to the three of them. The magistrate treated this as winding up the affairs of Pine Cone even though he concluded that the respondents had not properly dissolved the LLC. Both interim distributions and winding up of affairs were provided both by Idaho statute and by the operating agreement and if the operating agreement had no effect the magistrate, in granting summary judgment made an error of law set forth in Idaho Code, Section 53-646.

Counsel for the respondents correctly points out that the jurisdictional issue raised by the District Court needs to be determined. On receipt of the judgment in favor of appellant counsel forthwith filed a motion to correct the judgment and waived his right to oral argument as provided in I.R.C.P. 7 (b)(3). Your appellant,

immediately receiving the same, three days later, forthwith filed an objection to the motion without an opportunity for oral argument. Apparently the magistrate chose to file a correction forthwith and not wait for an opportunity of appellant to respond. Both documents were filed the same date. The District Judge concluded that this was untimely as the magistrate was proceeding pursuant to I.R.C.P. 60 (a). It should be noted that counsel did not ask for a correction pursuant to that rule. The only rule that counsel could and would utilize was I.R.C.P 59 (e). It appears to appellant that the District Judge, in perceiving the record that merits reversal, elected to treat this as a clerical error to end appellant's right to attempt to claim justice. The District Court erred in asserting that the correction related back to November 5th, 2009. As the federal court has stated a decision based on the misapprehension of the law may constitute an abuse of discretion. Fetterly v. Packet. 997 F. 2d 1295. If discretion exists for the District Court to change the motion of respondents to that of a procedure not requiring a hearing is unknown but in any event the magistrate determined that he would clear the record and entered his order of December 7, 2009. Appellant's Notice of Appeal was timely filed as it was the last Order directed at the issue of an inappropriate grant of summary judgment against appellant.

Appellant not only contends that there was not only a timely filing but also contends that the District Court erred in treating respondent's' motion and the magistrate's order of correction as a clerical error. A clerical error is an error that does not involve a legal decision. Silsby v. Kepner, 140 Idaho 410, 95 P. 3d 28. As the Alaska court has stated in Frost v. Ayejiak, 957 P.2d 1353, whether an error is a "

clerical error " within the meaning of civil procedure rule is a question of law. Where the court changed the judgment where it related to a "substantial defect" in the initial judgment the same is improper. In that case the appellate court concluded that a misnomer was a " substantial defect" that cannot be corrected pursuant to rule 60 (a). The Indiana court agrees in Rostentrater v. Rostentrater, 708 NE 2d 628 that motion for relief from judgment due to a clerical mistake cannot be used for purposes of correcting errors of substance. Our Idaho Court addressed this issue a number of years ago in First Security Bank v. Neibauer, 98 Idaho 598, 570 P.2d 276 when it determined that under Rule 59 (e) a motion to correct destroys the finality of a judgment for purposes of appeal and the full time for appeal continues to run anew from the entry of an order disposing of the rule 59(e) motion. Mr. Holmes' motion was filed under Rule 59 (e). Later the Court in First Security Bank v.Stauffer, 112 Idaho 133, 730 P. 2d 1053 determined that a motion to amend a judgment, including a default judgment, which would be prejudicial to another party, may not be granted without notice and an opportunity for a hearing as to do so contravenes the very basis of due process and finality of judgments.

As appellant has contended from day one, the granting of a summary judgment in favor of the respondents who failed to comply with the terms of an operating agreement or with the general statutes directing procedures for an LLC that did not have an operating agreement merits reversal. It should also be noted that neither the magistrate nor their counsel could explain how the magistrate could create a debt owed by appellant to the respondents when the capital loss is nothing more than a bookkeeping entry which requires adjustment by reducing appellant's

capital interest from his 20% interest in the proceeds of sale. If there is a debt it would be owed to Pine Cone in which appellant would have a 20% interest. Perhaps the respondents should be required to replace all of the assets they took and then an appropriate division could be made to all five individuals who each held a 20% interest. Additionally the monies for an attorney, not validly employed by Pine Cone, at least the $ 25,000.00 obtained from the seller, should also be deemed to be owed by the respondents to the LLC. as it was contrary to the agreement.

Without a transfer of title of appellant's interest in Pine Cone it can not be conceived how the magistrate could determine that appellant was frivolous or without any foundation for a claim against the respondents so as to implement the provisions of Idaho Code Section 121 on the issue of summary judgment proceedings. The magistrate determined of his own mind that he was going to award fees without waiting for a claim. Now respondents are claiming attorney fees under the same theory that appellant is being frivolous in this appeal. Both claims should be rejected.

CONCLUSION

The proceedings before the magistrate are wrought with error commencing with the filing of the Hunter affidavit in contravention of procedural rules through the decision of the District Court. It appears to appellant that neither the magistrate nor the District Judge even considered I.R.C.P, 1 (a) that provides for "liberal construction" of the

rules in the interest of justice. As appellant recalls there is a Supreme Court opinion which establishes a precedent that if the Court deems Summary Judgment is improper it can take the next step and determine that the opposite party is entitled to a summary judgment if the facts of record, as the Court sees it, would support such a finding. Appellant believes that such would be appropriate here as appellant only sought a partial summary judgment asking the Court to determine that appellant had a 20% interest in Pine Cone with the question as to the value of that interest to be determined at trial.

Respectfully Submitted,

John B. Kugler

JOHN B. KUGLER

Certificate of Service

I hereby certify that two true and bound copies of the foregoing Appellant's Brief was served on the respondents this ~~14th~~ 15th TH day of November, 2011 by mailing the same to Thomas J. Holmes, P.O. Box 967, Pocatello, ID 83204.

John B. Kugler

JOHN B. KUGLER